Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Guidance on Open Internet Transparency Rule Requirements	)	GN Docket No. 14-28
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APPLICATION FOR REVIEW OF COMPETITIVE CARRIERS ASSOCIATION

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TABLE OF CONTENTS

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In the Matter of	)	
	)	
Guidance on Open Internet Transparency Rule Requirements	)	GN Docket No. 14-28
	)	
	)	
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Pursuant to 47 C.F.R. § 1.115, Competitive Carriers Association ("CCA") respectfully submits this Application for Review of the Public Notice issued by the Chief Technologist, Office of General Counsel, and Enforcement Bureau (collectively, the "Bureaus") on May 19, 2016 in the above-captioned proceeding (the "Public Notice").[1] As discussed herein, the Public Notice enacts unlawful changes to the existing transparency disclosure rules adopted pursuant to the *2010 Open Internet Order*[2] and the *2015 Open Internet Order*[3] without first issuing a notice and comment rulemaking proceeding pursuant to the Administrative Procedures Act ("APA"). In addition, the proposed changes do not provide the intended benefits; rather, they potentially have the effect of harming competitive carriers and consumers.

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1 *Guidance on Open Internet Transparency Rule Requirements*, GN Docket No. 14-28, Public Notice, DA 16-569 (rel. May 19, 2016) ("Public Notice").

2 *Preserving the Open Internet*, GN Docket No., 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) ("2010 Open Internet Order"), *aff'd in relevant part Verizon v. FCC,* 740 F.3d 623 (D.C. Cir. 2014).

3 *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, 30 FCC Rcd 5601 (2015) ("2015 Open Internet Order"), *aff'd USTA v. FCC*, No. 15-1063 (D.C. Cir. June 14, 2016).

I. INTRODUCTION AND SUMMARY

The Public Notice adopts substantive rule changes to which the APA's notice and comment requirements should have applied, including: (1) the imposition of a network performance measurement standard based upon Cellular Market Areas ("CMAs"); (2) the mobile Measuring Broadband American Safe Harbor ("mobile MBA safe harbor"); and (3) a new standard of conduct requirement for point of sale disclosures. The Public Notice implements the mobile MBA safe harbor for mobile carriers that, derived from a "national" data set and reliant upon CMA-based measurements, is effectively unavailable to non-nationwide carriers.

The Public Notice also contradicts the text of the *2015 Open Internet Order*[4] by imposing a single geographic basis for network performance measurements and promulgating an unprecedented new point of sale requirement that is unclearly written and potentially onerous. The Public Notice is therefore deficient from both a legal and policy standpoint. This document should have been subject to a public notice and comment rulemaking as is required by the Administrative Procedure Act. In addition, the Paperwork Reduction Act Notice[5] ("*PRA Notice")*, which seeks Office of Management and Budget ("OMB") clearance and public comment on the Commission's estimated cost burdens for compliance with the enhanced transparency rules, did not describe the decisions ultimately finalized in the Public Notice, and a conclusory public notice is not the appropriate mechanism under the APA for adoption of a complicated, data-intensive program like the mobile MBA safe harbor.

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4 *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, 30 FCC Rcd 5601, 5673-75, ¶ 166 (2015) ("2015 Open Internet Order").

5 Federal Communications Commission, Information Collection Being Reviewed by the Federal Communications Commission, 80 Fed. Reg. 29000 (May 20, 2015) ("PRA Notice").

CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. CCA's membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents approximately 200 associate members including vendors and suppliers providing products and services throughout the mobile communications supply chain. CCA members, large and small, are negatively impacted by the new transparency rules masquerading as guidance and adopted without meaningful opportunity for comment.

To stay afloat in a rapidly consolidating mobile marketplace, transparency and customer trust are critical. CCA members therefore invest a great deal of time and capital into ensuring compliance with the Commission's transparency disclosure requirements to engender loyalty and trust with their customers.[6]

Competitive carriers must rely heavily on guidance provided by the Commission to comply with the complex transparency rules adopted in both *Open Internet* Orders. Nevertheless, rather than clarify those rules, the Bureaus promulgated comprehensive new rules without a rulemaking required by the APA. The new rules are inconsistent, contradictory, and overly burdensome, and their lack of clarity will impair competitive carriers' ability to comply.

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[6] Broadband Internet access service ("BIAS") providers that have more than 100,000 broadband connections as reflected in the providers' most recent Forms 477, aggregated over all of the providers' affiliates, are subject to "enhanced" transparency rules and must disclose a wide variety of information tied to their service offerings as described in the *2015 Open Internet Order* and clarified in prior and subsequent advisory guidance, including information on service plans, speeds, latency, network management practices, fees, and promotional rates. Exempt providers, those with 100,000 or fewer broadband connections are subject to the standard transparency rules and therefore must disclose similar information, but are generally held to a less onerous standard of disclosure, as described in the *2010 Open Internet Order*. The enhanced transparency rules are not yet effective.

II. THE COMMISSION EXCEEDED ITS AUTHORITY UNDER THE ADMINISTRATIVE PROCEDURES ACT BY ESTABLISHING SUBSTANTIVE NEW RULES IN THE PUBLIC NOTICE WITHOUT A NOTICE AND COMMENT RULEMAKING

Section 1.115(a) of the FCC's rules allows any person aggrieved by an action taken pursuant to delegated authority to file an application requesting review by the full Commission.[7] As discussed further herein, CCA, on behalf of its members, is aggrieved as a result of the adoption of rules under the guise of guidance with which its members may be unable to comply.[8] Among the grounds warranting Commission action on review are the conflict between the action taken pursuant to delegated authority and statute, regulation, case precedent or established Commission policy.[9] Here, the Bureaus' actions taken pursuant to delegated authority violated the APA's notice and comment procedures and exceeded the authority of the Bureaus.

Agencies are required to abide by the APA's notice and comment procedures when revising existing rules or establishing new rules. The Commission may promulgate new legislative rules that "create new law, rights, or duties,"[10] but only after following the procedures

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7 47 C.F.R § 1.115(a). To the extent the Commission treats this filing as a Petition for Reconsideration, CCA requests consideration by the full Commission due to the importance of the issues presented herein. *See* 47 C.F.R. § 0.5(c).

8 *Cf.* 47 C.F.R. § 1.115(a). It was not possible for CCA to participate in the "earlier stages" of this proceeding because there was no opportunity for notice and comment on the guidance adopted in this Public Notice. CCA, did, however, actively participate in the rulemaking leading up to the adoption of the *2015 Open Internet Order*.

9 47 C.F.R. Section 1.115(b)(2)(i); *see also id.* at (ii) ("[t]he action involves a question of law or policy which has not previously been resolved by the Commission"); (iii) ("[t]he action involves application of a precedent or policy which should be overturned or revised"); and (v) ("[p]rejudicial procedural error").

10 *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991).

set forth in Section 553 of the APA.[11] Moreover, a rulemaking involving notice and an opportunity for public comment is required when an agency "adopt[s] a new position inconsistent with" existing regulations or effects "a substantive change in the regulations."[12] A notice proposing rule changes must "provide[s] sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."[13] An agency also "may not bypass [the APA's notice and comment procedures] by rewriting its rules under the rubric of interpretation."[14] It follows that if a document labeled "guidance" nonetheless establishes substantive rules, there must be a notice and comment must be provided before the adoption of "guidance" establishing new or modified rules.[15]

The Public Notice, despite being labeled as "guidance," adopts substantive rules changes including: (1) imposing CMA-level performance measurements; (2) adopting the mobile MBA safe harbor for mobile providers, which appears to exclude licensees not covered by the "national" data set belying the program; and (3) implementing a new point of sale disclosure requirement imposing a potentially onerous new standard of conduct.

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11 *See* 5 U.S.C. § 553 (providing for general notice of proposed rulemaking to be published in the Federal Register, along with the opportunity for interested parties to participate in the rulemaking through the submission of comments).

12 *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (internal quotation omitted).

13 *United States Telecom Ass'n v. FCC,* Case No. 15-1063, slip op. at 29 (D.C. Cir. 2016), *citing Honeywell International, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004).

14 *C.F. Communications Corp.* v. *FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997).

15 *E.g., Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014) (Department of Labor "Guidance Letters" were legislative rules and thus violated the APA because they were issued without providing public notice and opportunity for comment); *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011) (vacating EPA's "Guidance" document addressing Clean Air Act implementation because it was a legislative rule that had not been adopted after notice and comment rulemaking and thus violated the APA).

While the 2015 Open Internet Order noted "the mobile MBA program, which could at the appropriate time be declared a safe harbor for mobile broadband providers," it did not state when. Nor did the 2015 Open Internet Order require "receipt" by customers at point of sale of open Internet disclosures, instead of receipt of a link to provision at a website. Moreover, the extremely brief *PRA Notice* did not request comment on either such issue. As stated in *United States Telecom Ass'n v. FCC,*[16], an NPRM is sufficient if it "expressly ask[s] for comments on a particular issue or ma[kes] clear that the agency [is] contemplating a particular change." In this case, the Commission never released an NPRM asking for comment on CMA metrics, the mobile MBA safe harbor, nor the point of sale disclosure requirement described in the Public Notice. Accordingly, CCA urges the Commission to set aside the Public Notice and instead initiate a rulemaking affording appropriate notice and opportunity for comment on these issues.

A. Cellular Market Area Metrics

The *2015 Open Internet Order* requires that disclosures of actual speed, latency and packet loss must "be reasonably related to the performance the consumer would likely experience in *the geographic area in which the consumer is purchasing service*."[17] In adopting this requirement, the Commission declined to specify methodologies for measuring and disclosing geographic granularity and other aspects of network performance data, and instead, delegated the task of providing guidance on "acceptable [measurement] methodologies" to the Chief Technologist of the FCC.[18]

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16 No. 15-1063, slip op. at 30 (D.C. Cir. 2016).

17 *2015 Open Internet Order* ¶ 166 (emphasis supplied).

18 *Id.*

Rather than providing guidance on acceptable methodologies, *plural*, as directed by the Commission, in the Public Notice, the Bureaus effectively determine that a *single* geographic area measurement – CMAs – is the basis for compliance with the performance disclosures for mobile providers.[19] In establishing this metric, the Commission did not mention any other performance metrics as sufficient for compliance, and this reliance on a single measurement, CMAs, is reinforced by the mobile MBA Safe Harbor, which also measures network performance at the CMA level.[20] This "guidance" contradicts the Commission's directive that the disclosures of speed, latency and packet loss "be reasonably related to the performance the consumer would likely experience in *the geographic area in which the consumer is purchasing service*" and flies in the face of the Commission's explicit directive in the *2015 Open Internet Order* that anticipates the use of more than one methodology.[21] The Public Notice does not account for carriers that will experience difficulty complying with the Bureaus' guidance since they do not measure their network on a CMA basis. By imposing a CMA-level measurement requirement for network performance metrics, despite clearly indicating more than one network measurement methodologies would be acceptable, the Commission has substantially changed its existing rules in violation of the APA.

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19 Public Notice at 5 ("We therefore clarify that mobile BIAS providers with access to reliable actual data on network performance may meet this requirement by disclosing actual performance metrics for each Cellular Market Area (CMA) in which the service is offered . . .).

20 *Compare* Public Notice at 6 (the mobile MBA program will provide "at a minimum, network performance metrics for each such service for each CMA in which the program has a sufficient CMA sample size, and additional sets of these network performance metrics aggregated among sets of the CMAs") with Public Notice at 7 ("mobile BIAS providers that, instead of taking advantage of the MBA safe harbor, measure network performance by their own or third-party testing may disclose performance metrics for each CMA in which the service is offered . . .").

21 *2015 Open Internet Order* ¶ 166 (emphasis supplied).

B. The Mobile MBA Safe Harbor

The Public Notice specifically states:

> we *establish* that mobile BIAS providers may disclose their results from the mobile MBA program as a sufficient disclosure of actual download and upload speeds, actual latency, and actual packet loss of a service if the results satisfy the above sample size criteria and if the MBA program has provided CMA-specific network performance metrics of the service in CMAs with an aggregate population of at least one half of the aggregate population of the CMAs in which the service is offered.[22]

In their own words, the Bureaus acknowledge they are creating new rules with adoption of the "safe harbor" yet these rules exceed the scope of any notice of changes and this program was not discussed in the NPRM preceding the *2015 Open Internet Order*. Certainly, the PRA Notice did not discuss the mobile MBA program or safe harbors, much less estimated associated costs that would lead a mobile carrier to believe the Bureaus were proposing new rules. Nevertheless, the PRA Notice is not an appropriate vehicle to create new law. The Public Notice therefore breaches the Commission's APA obligations.

As an initial matter, the mobile MBA program and its utility as a safe harbor has never been substantively addressed by the Commission. The Commission vaguely alluded to the program in its *2015 Open Internet Order*, when the Commission speculated that this program "could at the appropriate time be declared a safe harbor for mobile broadband providers."[23] Beyond the lack of clarity, the possibility of adoption of a safe harbor was absent from the NPRM leading up to adoption of the *2015 Open Internet Order* and the PRA Notice. A public

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[22] Public Notice at 6 (emphasis supplied).

[23] *2015 Open Internet Order* ¶ 166.

notice is not the appropriate mechanism for adoption of a complicated, data-intensive program like the mobile MBA Safe Harbor.

CCA members comply with transparency requirements for the good of their customers and for ease of operation, but also to avoid enforcement actions likely to be immensely expensive and time-consuming.[24] The potentially crippling nature of enforcement actions has resulted in BIAS providers treating any safe harbor as, essentially, *de facto* compliance requirements.[25] Even though a safe harbor may be labeled as voluntary, it provides regulatory certainty. Here, although the Bureaus label the safe harbor as a voluntary measure, compliance with it is a proxy for rules compliance, and failure to use it introduces the risk of untenable penalties.[26] As the D.C. Circuit has recognized "[i]f an agency uses a safe harbor to coerce parties toward a substantive result the agency prefers, and the safe harbor is voluntary in name only, then the agency is making substantive law."[27] Substantive law must be afforded a notice and comment period under the APA before new requirements are imposed. A safe harbor should not be designed without substantial input from the public, especially in this case, given that the result excludes many providers from protection.

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[24] For example, in the very first Open Internet enforcement action, the FCC proposed a $100 million forfeiture against AT&T Mobile Inc. for its alleged failure to adequately and accurately disclose throttling practices to its customers, in violation of the *2010 Open Internet* transparency requirements. *In the Matter of AT&T MOBILITY, LLC*, File No. EB-IHD-14-00017504, Notice of Apparent Liability for Forfeiture and Order, FCC 15-63 (rel. June 17, 2015).

[25] *See Renal Physicians Ass'n v. United States HHS*, 489 F.3d 1267, 1273 (D.C. Cir. 2007) ("every safe harbor has at least some substantive impact. The extent of this substantive impact turns on the scope of the risk associated with *not* using the safe harbor; the higher the risk, the more likely the safe harbor will attract regulated entities into its calm (litigation free) waters.").

[26] Public Notice at 3.

[27] *Renal Physicians Ass'n v. United States HHS*, 489 F.3d 1267, 1273 (D.C. Cir. 2007).

C. Point of Sale Disclosures

The Public Notice adopts a substantive new conduct requirement for carriers by demanding carriers "ensure" a consumer has "received" the content of transparency requirements in order to comply with the *2015 Open Internet Order.* As adopted in the *2010 Open Internet Order*, the "point of sale" disclosure rule requires BIAS providers to disclose network management practices, performance characteristics, and commercial terms "at the point of sale."[28] The FCC has stated that this disclosure requirement is satisfied by, "at a minimum, prominently display[ing] or provid[ing] links to disclosures on a publicly available, easily accessible website that is available to current and prospective end users and edge providers."[29] Due to confusion surrounding compliance with this rule, the Commission, on several occasions, has offered additional guidance. For instance, in 2011, Commission Staff provided that:

> Broadband providers can comply with the point-of-sale requirement by, for instance, directing prospective consumers at the point of sale, orally and/or prominently in writing, to a web address at which the required disclosures are clearly posted and appropriately updated.[30]

This *2011 Advisory Guidance* implies an array of possibilities for compliance, including a clear instruction that carrier can provide a link to disclosures at the point of sale. Four years later, in a single sentence in a footnote, the *2015 Open Internet Order* declared that "[i]t is not sufficient for broadband providers simply to provide a link to their disclosures."[31]

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28 *2010 Open Internet Order* ¶ 57.

29 *Id.* ¶¶ 57-58 & fn. 186.

30 *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, Public Notice, 26 FCC Rcd 9411 (2011). ("*2011 Advisory Guidance*").

31 *2015 Open Internet Order* ¶171 n. 424.

The PRA Notice did not provide an opportunity for substantive comment and thus is not an appropriate justification for the point of sale disclosure requirement described in the Public Notice. The PRA Notice provided a brief description of intent as well as the estimated total annual cost, and total annual monetary burden associated with the transparency rules adopted in the *2015 Open Internet Order*.[32] Although point of disclosure requirements are a component of transparency rules, the substance of point of sale disclosure requirements was not addressed nor was a stand-alone cost estimate listed for point of sale disclosures. Even if it had, considering the point of sale requirement described in the Public Notice is a material departure from all previous Commission descriptions and guidance, the PRA Notice would not have provided an adequate opportunity for comment.

While the Public Notice identifies this discrepancy, it also makes a significant substantive change to the point of sale obligations. Rather than offer clarification, the Bureaus instead state, for the first time, that providers must take steps to ensure that consumers "actually receive" the disclosure before the sale occurs.[33] Thus, in effect, the Bureaus have revised a once-flexible requirement into a mandate to elicit definitive receipt by every consumer, resulting in a materially different compliance standard and altering the explicit meaning of the *2010 Open*

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[32] It is unclear whether the provided estimates refer to the cost of compliance stemming from the *2010 Open Internet Order* and the enhanced transparency requirements promulgated by the *2015 Open Internet Order*, or just the enhanced transparency requirements.

[33] Public Notice at 10.

Internet Order.[34] The Bureaus did not "explain the reasons for [the] changed interpretation."[35] Without notice and opportunity for comment, the Bureaus "may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[36] This violates the APA by failing to provide an opportunity for notice and comment.

III. THE UNCLEAR AND UNWORKABLE "GUIDANCE" IN THE PUBLIC NOTICE WOULD BENEFIT FROM STAKEHOLDER INPUT

The guidance provided by the Public Notice inappropriately fails to properly account for licenses not based upon CMAs with respect to required disclosures of actual performance metrics. The mobile MBA safe harbor will be unavailable to mobile carriers whose service areas are not covered by the data supporting the MBA program, robbing those carriers of a chance to take advantage of the competitive benefits and cost streamlining regulatory certainty affords. The new point of sale disclosure requirement could be expensive to implement, especially for small carriers.

Had these and other rule changes been properly presented in a formal notice and comment rulemaking proceeding, they would have received the benefit of a robust record from industry stakeholders holding various interests and experiences. Indeed, competitive carriers would certainly have provided substantial feedback in response to the issues presented in the Public Notice, which would have further guided the Bureaus and/or Commission, or at the very

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[34] In addition to imposing an entirely new standard of conduct, the Bureaus also fail to provide any guidance as to what it means to ensure that consumer "actually receive" the disclosures, ironically, amplifying the confusion through this "guidance." The Commission cannot "promulgate mush and then give it concrete form only through subsequent less formal 'interpretations'" *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront,* 174 F.3d 166, 174 (3d Cir. 1999).

[35] *Verizon v. FCC,* 740 F.3d 623, 636 (D.C. Cir. 2014).

[36] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

least, would have flagged certain issues that were inadequately addressed or unclear, just as CCA raises here.

A. Cellular Market Area Metrics

The *2015 Open Internet Order* requires that disclosures of actual speed, latency and packet loss "be reasonably related to the performance the consumer would likely experience in the geographic area in which the consumer is purchasing service."[37] The Public Notice states mobile broadband providers with access to reliable actual data on network performance may meet this requirement by disclosing actual performance metrics for each CMA in which the service is offered.[38] Nonetheless, in the full context of the Public Notice, the CMA metric reads like a requirement rather than an option. As explained above, this CMA-level metric forming the root of the actual speed, latency, and packet loss requirements is unsuitable, and the guidance surrounding this metric should be rescinded pending input from the wider telecommunications community.

As an initial matter, many mobile broadband providers do not track their networks on a CMA basis. Carriers with FCC license areas that do not track CMA boundaries may not be able to provide CMA-based network data and, therefore, will not be able to easily comply with this rule. It is unreasonable to expect providers to be responsible for acquiring this information, likely for an additional cost through a third party, when providers are able to provide reliable data for the actual service areas they cover through their own means.

Assuming the Bureaus adopted a CMA-level metric requirement for actual network performance disclosures, they do not explain their decision. The main purpose underlying the

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[37] *2015 Open Internet Order* ¶ 166.

[38] Public Notice at 5.

transparency rules is to better inform consumers about their services. It is difficult to believe that the average consumer would recognize whether the metric was offered on a CMA-basis or a PEA-basis, or would even know what those terms meant. Using technical and industry-expert terms would likely cause additional confusion among consumers, which is contrary to the Commission's own stated goals.

The Commission and Bureaus must account for *all* providers when offering guidance on compliance issues, and therefore should seek comment on appropriate metrics for such requirements.

B. The Mobile MBA Safe Harbor

The mobile MBA Safe Harbor also is essentially unworkable at this time, and would not actually provide a viable safe harbor for most, if not all, competitive carriers. Although the Bureaus "anticipate" that the first Mobile Broadband Report will be published in 2016, there is no definitive deadline available.[39] This uncertainty is not promising, considering the importance of this data-intensive safe harbor.

It also is unclear if and when the Commission will, or can, improve the data set to include the coverage areas of all providers subject to the transparency disclosure requirements. The mobile MBA safe harbor is problematic for all providers, but particularly for rural and regional providers (really, any carrier outside the four nationwide providers or any carrier operating in a rural market) whose coverage areas likely will not be covered by the actual data released by the program. The data for the mobile MBA safe harbor covers:

[39] *See* Public Notice at 6.

> those services for which it has a sufficient national sample size. The program will provide, at a minimum, network performance metrics for each such service for each CMA in which the program has a sufficient CMA sample size, and additional sets of these network performance metrics aggregated among sets of other CMAs.[40]

In other words, this safe harbor for actual network performance metrics is available only if the results of the mobile MBA program "satisfy the [national] sample size criteria and if the MBA program has provided CMA-specific network performance metrics of the service in CMAs with an aggregate population of at least one-half of the aggregate population of the CMAs in which the service is offered."[41] In effect, many rural and regional providers will not be able to utilize the mobile MBA safe harbor at all because they do not hold CMA-sized licenses, and as a consequence, the Public Notice therefore excludes many regional and mid-sized providers who are not exempt from these transparency requirements, yet do not provide nationwide coverage over their own network.

CCA understands the mobile MBA program will not track many regions outside of major urban areas typically served by mid-sized providers offering service to regional and rural consumers. It is unfair and anticompetitive to provide a "safe harbor" to only a few carriers that must meet the enhanced transparency requirements, while the majority of carriers subjected to the enhanced rules have to determine compliance on an individual and subjective basis. Even if the FCC provides estimates for these areas based on larger data sets, the released data may not be accurate with respect to the coverage area of the non-nationwide carrier.

The mobile MBA safe harbor will be even more problematic if the Commission does not provide data for "each such service" a competitive carrier provides, considering many

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40 *Id.*

41 *Id.*

competitive carriers are still implementing 3G and 4G networks. Even if the mobile MBA safe harbor provided CMA-level data for the entire U.S., the safe harbor would still be unavailable to many competitive carriers if that data covered, for example, only 4G service coverage. It is unfair and anticompetitive to provide a "safe harbor" to a few carriers that must meet the enhanced transparency requirements, while a majority of carriers subjected to the enhance rules have to determine compliance on an individual and subjective basis.

Essentially refusing to provide a safe harbor to all but the largest providers is an anticompetitive practice that should not be accepted by the Commission, especially at a time of increasing industry consolidation and diminishing spectrum resources. The Commission should have given all mobile BIAS providers the opportunity to comment on whether data provided by commercial third parties (e.g., CCA member Mosaik which has existing relationships with many CCA carrier members) could be used as a viable substitute for mobile MBA data as a safe harbor. Indeed, there is significant amounts of commercially available data that could satisfy the Commission's goals while not being overly burdensome, or completely unavailable, to competitive carriers. The Bureaus would know this if they had sought notice and comment.

A safe harbor for something as important to competition as actual network performance should cover all providers, and should make use of the best information available. The mobile MBA safe harbor program falls short of the mark. The Commission should therefore vacate the Public Notice and commence a rulemaking to produce a safe harbor that better informs consumers and is inclusive of all mobile providers. A rulemaking would help to create a transparent process on which to base any adopted safe harbor, such as by explaining the data collection methods in depth before adopting a safe harbor as well as providing other salient details such as how often the data will be updated.

C. Point of Sale Disclosures

Without providing examples or explanation, the Public Notice states that BIAS providers "must ensure that consumers actually receive the information necessary to make informed decisions prior to making a final purchasing decision at all potential points of sale, including in a store, over the phone, and online."[42] It remains unclear how a provider would "ensure" a customer accurately "received" information comprising a required disclosure under the *Open Internet Orders*, especially given (as described above) the Commission's confusing and contradictory history with respect to describing the point of sale transparency requirement.[43] The Commission should understand that charging providers with the responsibility to "ensure" their customers "understand" their policies does not communicate a clear path to compliance and its setting carriers up to fail.

There are several ways to reasonably interpret the Public Notice's new substantive point of sale regulation. One may believe that the link distributed must merely be functional, and that the information on the website at the end of the link must simply be accurate to comply with the provision. Another may reasonably interpret this guidance as requiring providers to obtain some evidence of affirmative consent or acknowledgement by the customer, like a click-wrap agreement or a signed waiver. Unfortunately, the Bureaus provide no further guidance to

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42 Public Notice at 8.

43 The Public Notice attempts to explain that providers can in fact comply by providing a link to a website, *but* disclosures will not be considered duly "meaningful" unless point of sale disclosure methods "actually lead potential customers to the relevant disclosure information so that informed purchasing decisions can be made by those customers." Public Notice at 10. Further, "BIAS providers must ensure that consumers actually receive any Open Internet-related information that is relevant to their purchasing decision at all potential points of sale, including in a store, over the phone, and online." *Id.*

accompany the new substantive regulation which may leave providers in the unfortunate position of having to guess at the Bureaus' intentions and risk running afoul of the new rules.

Under any interpretation of the Public Notice, the point of sale disclosure rule is unreasonable. While carriers can lead customers to water, they cannot make them drink. For example, if a carrier provides a link disclosed to customers at the point of sale, and customers choose not to follow it, a requirement that the carrier must then make sure the customers "actually receive" the disclosures would unreasonably require carriers to force customers to click the link.

Clarification, and a cost benefit analysis, from the Commission would be helpful considering the cost of implementing disclosure policies varies among carriers. Indeed, it would be much more expensive for a carrier, particularly smaller carriers, to redesign their sales model and online interface to ensure customers would have the opportunity to review the necessary disclosures and indicate "actual receipt." Having a notice and comment period would allow mobile providers to demonstrate that the Commission's new substantive point of sale regulation is not in the public interest.

The confusion resulting from the point of sale "guidance" is compounded by the Bureaus' suggestion that the Broadband Disclosure Labels, as released on April 4, 2016, could also be used as a disclosure safe harbor.[44] Specifically, the Public Notice provides that the use of these labels may act as a safe harbor for the point of sale disclosure requirements, and must be "used at point of sale," including at "retail outlets" and at "other various points of sale."[45]

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[44] Public Notice at 10.

[45] *Id.*

As an initial matter, the Broadband Disclosure Labels themselves are confusing and not applicable to all providers. The labels incorporate both transparency requirements outlined in the *2010 Open Internet Order*[46] and *enhanced* transparency requirements outlined in the *2015 Open Internet Order*.[47] In the *2015 Open Internet Order*, the Commission adopted a temporary exemption from enhanced transparency disclosures for "small providers," referring to providers with 100,000 or fewer broadband connections as reflected in the providers' most recent Forms 477, aggregated over all of the providers' affiliates.[48] This exemption was extended until December 15, 2016.[49] Providers exempt from the enhanced transparency requirements must nonetheless abide by transparency requirements outlined in the *2010 Open Internet Order*.

However, despite adoption of the exemption, the Consumer Broadband Label requires carriers to provide information that exempt carriers are not required to provide, such as granular pricing details, typical speeds encompassing typical peak usage periods, packet loss, and latency.[50] The small provider exemption was designed specifically to free small providers from

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46 *2010 Open Internet Order* ¶¶ 56, 59.

47 *2015 Open Internet Order* ¶ 166.

48 *Id.* ¶ 24.

49 *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order, 30 FCC Rcd 14162, ¶ 6 (2015) ("*2015 CGB Order"*). The currently pending H.R. 4596, the Small Business Broadband Deployment Act, is bipartisan legislation would extend the small business exemption for three years, defines small businesses as internet service providers with 250,000 subscribers or less, and requires an FCC report about the definition of small businesses and the future of this exemption. The Senate advanced the bill on June 16, 2016, with an amendment reducing the exemption from five to three years.

50 Trying to provide a "best estimate" of any information accounted for on the labels would be difficult, and due to certain constraints, potentially inaccurate. For example, in rural networks, packet loss can vary depending on the geographic area covered. Rural networks can include geographic areas with a variety of topography or physical features that impede or enhance transmissions, as well as equipment supplied by multiple vendors, frequencies in several bands, and sites using different types of transmitters. Therefore, providing a single number merely to make use of the disclosure label would mislead the public – an outcome that no one desires.

being forced to expend substantial financial and personnel resources to provide this data. The vast majority of CCA's carrier members are exempt small providers, and thus are not subject to enhanced transparency disclosure requirements. Thus, the FCC seems to have excluded a large number of wireless carriers from its consideration of a safe harbor opportunity, which is unacceptable.

Accordingly, exempt providers are unlikely to use the label because it would impose significant burdens, result in inaccurate disclosures or actually force exempt providers into complying with enhanced transparency regulations from which they have been rightfully exempt. The Commission should create safe harbor that exempt providers can utilize to provide smaller carriers with certainty and efficiency that a relevant safe harbor could offer.

IV. CONCLUSION

For the foregoing reasons, CCA respectfully requests that the Commission grant this Application for Review and take the recommended actions discussed herein.

Respectfully submitted,

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Additionally, the label requires providers to "identify typical peak usage period download and upload speeds for this network technology, consistent with the Open Internet Orders and FCC guidance." However, exempt providers are not required to list "peak usage period" speed measurements, and measuring peak usage could require significant additional resources. Therefore, some exempt providers may choose to state a range of speeds their subscribers can expect to experience, as permitted by the Commission's rules, but may result in confusion to the customer. This result is not consistent with the Commission's transparency goals.

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2016, I caused the foregoing Application for Review to be sent by U.S. Mail to the following parties:

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